Supreme Court, U.S.
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No. 00-1357

In The
# Supreme Court for the United States

October Term, 2000

BRUCE BUCHBINDER, et ux.,

*Petitioner,*

v.

FRANCHISE TAX BOARD, et al.,
STATE OF CALIFORNIA

*Respondent.*

**Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## SUPPLEMENTAL BRIEF

BRUCE BUCHBINDER
ELAINE BUCHBINDER
1178 Via Ferrari Drive
San Jose, California 95122
(408) 279-4054
*Petitioner In Pro Se*

13pp

## QUESTIONS PRESENTED

1. Should the Court grant certiorari in a case where statements of fact and law go uncontested pursuant to waiver by respondent, wherein respondent had an obligation to point out perceived misstatements made in petitioner's petition (Supreme Court Rule 15.2), and by not responding renders rebuttal moot, pre-empting any further litigation, in that any objection to consideration of a question presented based on what occurred in the proceedings below may be deemed waived unless called to the Court's attention in the brief in opposition; thus leaving respondent in the precarious position of accepting the risk that any objection it may later make may be deemed waived, clearly indicating to the Court its acquiescence to petitioner's version of the law and facts?

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## PRELIMINARY STATEMENT

Petitioner Bruce and Elaine Buchbinder come before this Court stating there exists an intervening circumstance of a controlling effect, not previously presented to this Court. The intervening circumstance is set forth within the body of the Brief herein.

## STATEMENT OF THE CASE

On February 27, 2001, petitioner Bruce Buchbinder and Elaine Buchbinder filed a Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit, seeking the issuance of a supervisory opinion in review of the actions of the United States Court of Appeals for the Ninth Circuit and the United States District Court for the Northern District of California. The relief sought resulted from the subsequent dismissal of the Buchbinders' case by the Ninth Circuit and District Court which effectively and subsequently denied petitioner's constitutionally protected right to full and meaningful review and substantive due process.

Petitioner presented a case against respondent, complaining that the Ninth Circuit Court of Appeals gravely erred by affirming the lower court's order dismissing the action for lack of jurisdiction, in that neither the Tax Injunction Act nor the Eleventh Amendment applied to petitioner's persona (nor to respondent), and in that respondent's argument regarding 42 U.S.C. § 1983 was meritless, the state and its agencies satisfying the definition of 'person' in 42 U.S.C. § 1983, and being that the lower court was heavily influenced by respondent's erroneous argument regarding 42 U.S.C. § 1983, in rendering its flawed decision, thus the Ninth Circuit's action

leading to an issue of violation of petitioner's Right to due process; petitioner further complaining that the District Court erred by granting respondent's motion to dismiss on the pretense that the Tax Injunction Act applied to petitioner's persona when in fact the court was without evidence of a judicial determination that there was a tax liability in the first place. Petitioner stated in its petition for Writ of Certiorari filed on February 27, 2001, on page 20 that the case was a proper case for federal court jurisdiction not only because the state follows the federal judiciary in matters pertaining to state direct taxation of income, but also because the State was a party in interest to the outcome of the controversy in the instant matter, and further that the waiver issue was an issue raised by petitioner before the State Board of Equalization; and being that the waiver issue was a complex and delicate question that had its nexus in the federal judiciary process in a federal related case to the instant case, if this question was to be properly addressed it had to be addressed on the federal level due to the nature of the issue; no state court being proper venue for complex questions of law and fact raised by petitioner, such as the waiver issue in the instant case.

Petitioner further stated on pages 22 and 23 that being that petitioner raised a Federal Question of due process right violations pursuant Article III, Amendment I and Amendment V of the Constitution for the United States of America, and invoked federal jurisdiction to protect its secured Constitutional Rights, thereby exercising its secured Rights; and especially in light of the controversial waiver issue in petitioner's federal related case; in that the state follows federal judiciary outcome in matters of direct taxation of income; in that the Tax Injunction Act and Eleventh Amendment did not apply to petitioner's persona; in that the State was a party in interest to the outcome of the controversy; in that petitioner was never provided a hearing in District Court; and in that respondent's

argument regarding 42 U.S.C. § 1983 was without merit and groundless, the State and its agencies satisfying the definition of 'person' in 42 U.S.C. § 1983; the action of the lower courts in the instant case clearly constituted a denial of petitioner's Right to proper due process secured by the Constitution for the United States of America and Right to meaningful access to the Courts.

On March 15, 2001, during pendency of petitioner's Petition for a Writ of Certiorari to this Court, the Supervising Deputy Attorney General of the State of California, Randall Paul Borcherding, who makes appearance and is counsel for respondent, admitted to practice before this Court, appeared by brief and filed an express written waiver of right to file in opposition to petitioner's asserted facts and conclusions. A copy of the waiver appears in Appendix A.

## RESPONSE TO WAIVER

In its Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit, petitioner raised the question of whether the United States Court of Appeals for the Ninth Circuit properly affirmed the United States District Court's order dismissing the action for lack of jurisdiction where:

(a). the Tax Injunction Act that barred petitioner's claims before the court did not apply to petitioner's persona, the United States District Court being without evidence of a judicial determination that petitioner was a taxpayer or that there was a tax liability in the instant matter; and,

(b). the United States Court of Appeals gravely erred by affirming the lower court's order dismissing the

action, in that petitioner raised a Federal Question of due process right violations pursuant Article III, Amendment I and Amendment V of the Constitution for the United States of America, and invoked federal jurisdiction to protect its secured Constitutional Rights, in that petitioner was never provided a hearing in District Court, in that the outcome of petitioner's case in a federal related matter attached to the instant case in that the state follows federal judiciary outcome in matters of direct taxation of income; in that the State was a party in interest to the outcome of the controversy, in that the Tax Injunction Act and Eleventh Amendment supporting respondent's Motion to Dismiss did not apply to petitioner's persona, and in that respondent's argument regarding 42 U.S.C. § 1983 was without merit and groundless, the State having waived its sovereign immunity and the State and its agencies reduced to artificial persons, satisfying the definition of 'person' in 42 U.S.C. § 1983; these issues being substantial issues leading to an issue of violation of petitioner's Right to due process secured by the Constitution for the United States of America, and whether the arbitrary dismissal of petitioner's cause of action before the United States District Court and the Ninth Circuit Court of Appeals constituted a denial of proper due process and right to meaningful access to the courts, in light of the circumstances as a whole in the instant case?

These questions remain unanswered in respect to the petitioner.

Petitioner further raised the question of whether it had been deprived of its Due Process right, deprived of its Right to Redress of Grievance, and deprived of its Right to meaningful

access to the courts; petitioner having raised the question of whether the Tax Injunction Act and Eleventh Amendment, relied upon by respondent to support its motion to dismiss, applied to petitioner's persona (or to respondent's persona), and whether petitioner was justified in invoking its due process Right under the Constitution for the United States of America and raising a Federal Question of due process right violation in response to state authorities violating that right, especially in that the state was a party in interest to the outcome of the controversy in the instant matter; and whether federal jurisdiction was proper for the instant case where issues of law and fact in a related federal judiciary proceeding were controlling; and whether the waiver issue in that related federal case attached to the instant case, giving the federal judiciary jurisdiction in the instant matter, and whether federal jurisdiction was thus proper for a case raising the waiver issue, having its nexus in federal judiciary proceedings, properly denominating such a case for federal subject matter jurisdiction, such as in the instant case; whether the federal judiciary had original jurisdiction pursuant Article III, Section 2, Clause 1, in such cases as the instant case, in that the state follows federal judiciary outcome in matters of direct taxation of income; and finally whether the State and its agencies satisfied the definition of 'person' in 42 U.S.C. § 1983, in that the State waived its sovereign immunity, the State and its agencies reduced to artificial persons like any other corporation pursuant 28 U.S.C. § 1605, the Clearfield Doctrine (*Clearfield Trust Co. v. United States*, 318 U.S. 363, 63 S. Ct. 573, 87 L.Ed. 838 (1943)), and the California Government Code Section 6300 ed sequencia (satisfying definition in 42 U.S.C. § 1983).

The respondent expressly waived its right to respond in the instant case pursuant to Supreme Court Rule 15.5. Such a waiver, in the face of petitioner's asserted facts and conclusions, serves to leave the petitioner's allegations uncontested before the Court.

The respondent offered no defense against the assertions made by petitioner, and did not point out any perceived misstatements of law or fact *having an obligation* to do so pursuant to Supreme Court Rule 15.2. The respondent specifically chose to waive that right pursuant to 15.5. Such a response leaves the respondent in a precarious position, as any objection it may later make, should the Court grant certiorari, may be deemed waived in that it did not call such objection to the Court's attention in a brief in opposition; respondent thereby jeopardizing its capability to later object, clearly indicating to the Court its acquiescence to petitioner's version of the law and facts.

Respondent did not correct the record as to what issues were proper to bring before the Court, and specifically did not question the basis for the petition, nor question the grounds upon which petitioner raised its petition, nor did the respondent bring to the Court's attention that petitioner raised no valid Due Process issue, nor did respondent bring to the Court's attention that petitioner was making assertions which had no valid basis in the record. In short, respondent made no attempt to protect the basis it had established in the lower courts, as it had in other United States Supreme Court cases such as in *Woosley v. California,* (1993) 124 L.Ed. 2d 639, 113 S. Ct. 2416.

Instead of correcting the record, respondent waived its right to file a Brief in Opposition, rendering rebuttal moot on these issues, and by acquiescence defaulted thereby. Petitioner's statements and assertions unrebutted therefore, stand as truth, rendering respondent's rebuttal before the Court moot in the instant case. Under the Common Law Rule of Reasonable Argument, petitioner therefore claims a default judgment against respondent in the instant case, *U.S.* v. *Schneiderman,* (1951) 102 Fed. Supp. 87 and *States S.S. Company v. Permanente S.S. Corp.,* (1956) 231 F.2d. 82.

## CONCLUSION

Now therefore, since respondent has opted to waiver with full knowledge that the Court may deem its later objection waived, respondent has by its actions, rendered rebuttal moot and pre-empted further litigation, allowing petitioner's version of the law and facts to stand unrebutted, thereby conceding that petitioner did not receive proper Due Process of Law nor Redress of Grievance, nor meaningful access to the courts as complained of by petitioner in the instant case.

Therefore, in consideration of the injury caused to petitioner by respondent in the instant case, in the deprivation of its due process right and right to meaningful access to the courts, petitioner is deserving of an award of claimed damages, and hereby claims damages, punitive damages and court costs from the respondent in the amount of $125,000.00 due petitioner; respondent having caused petitioner undue disruption in Life, Liberty, and the Pursuit of Happiness.

Respectfully submitted,

BRUCE BUCHBINDER
Elaine Buchbinder
Petitioner in Pro Se
1178 Via Ferrari Drive
San Jose, California 95122
(408) 279-4054

DATED: March 27, 2001

**APPENDIX A**

# WAIVER

**SUPREME COURT OF THE UNITED STATES**

Supreme Court Case No. 00-1357

Bruce Buchbinder, et ux. v. Franchise Tax Board, State of California

(Petitioner) (Respondent)

**I DO NOT INTEND TO FILE A RESPONSE** to the petition for a writ of certiorari unless one is requested by the Court.

Please check one of the following boxes:

Please enter my appearance as Counsel of Record for all respondents.

If

X There are multiple respondents, and I do not represent all respondents. Please enter my appearance as Counsel of Record for the following respondent(s):

Franchise Tax Board of the State of California

I certify that I am a member of the Bar of the Supreme Court of the United States (Please explain if your name has changed since your admission):

Signature /s/ Randall Paul Borcherding

Date: March 15, 2001

(Type or print) Name Randall Paul Borcherding

X Mr. Ms. Mrs. Miss

California Attorney General's Office, Bill Lockyer, Attorney General, Timothy Laddish, Sr. Asst. Atty.

Firm Gen. Randall P. Borcherding, Supervising Deputy Atty. Gen., John Newman, Dep. Atty. Gen.

Address 455 Golden Gate Avenue, Suite 11000

City & State San Francisco, CA Zip 94102-7004

Phone (415) 703-5509

A COPY OF THIS FORM MUST BE SENT TO PETITIONER'S COUNSEL OR TO PETITIONER IF *PRO SE*. PLEASE INDICATE BELOW THE NAME(S) OF THE RECIPIENT(S) OF A COPY OF THIS FORM. NO ADDITIONAL CERTIFICATE OF SERVICE IS REQUIRED.

SEE REVERSE FOR INFORMATION CONCERNING THE STATUS OF A CASE ON THE DOCKET.

CC: Bruce Buchbinder
Elaine Buchbinder

CLER-0080-2-01